Supreme Court, U.S.
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No. 99-

IN THE
Supreme Court of the United States

JOHN SMITH,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals has jurisdiction, pursuant to *Perlman v. United States*, 247 U.S. 7, 13 (1918), over an in-house attorney's appeal of District Court orders enforcing a grand jury subpoena to the attorney's employer for his work product, and refusing to direct the government to return the attorney's work product that his employer had inadvertently disclosed.

LIST OF PARTIES AND RULE 29 LIST

John Smith is a pseudonym for the Petitioner herein, who was an appellant in the Court of Appeals. Smith was an intervenor in the District Court action from which the appeal was taken.

The United States of America, the respondent herein, was the appellee in the Court of Appeals. In the District Court, the United States of America was the movant as to the motion to compel production of documents, and it was the respondent as to motions for return of two documents inadvertently disclosed.

XYZ Corporation is a collective pseudonym for the corporations that were appellants in the Court of Appeals. In the District Court, XYZ Corporation was the movant as to motions for return of two documents inadvertently disclosed, and it was the respondent as to the motion to compel production of documents. This petition is not filed on behalf of the XYZ Corporation.

XYZ Corporation is a privately held corporation and has no publicly owned parent, subsidiary, or affiliate.

Because the proceedings in the District Court are sealed, the Court of Appeals referred to Smith as "Individual Appellant" and to XYZ Corporation as "Corporate Appellants."[1/]

[1/] Smith has filed a sealed version of this petition because the proceedings are sealed.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner John Smith ("Smith") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on September 20, 1999.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit ("Court of Appeals") is reported in *In re Grand Jury Subpoena*, 190 F.3d 375 (5th Cir. 1999), and is reprinted in the Appendix at 1a-28a (hereinafter "App. at __"). The Court of Appeals dismissed for lack of jurisdiction consolidated appeals from the orders of the United States District Court for the Southern District of Texas ("the District Court") in *In re Grand Jury Proceedings*, No. C-98-23 (S.D. Tex. Jul. 2, 1998; Feb. 18 and 24, 1999) (orders denying motions to compel return of documents and order compelling production of documents). The District Court's orders are reprinted in the Appendix at 31a-71a.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Smith seeks review of a decision by the Court of Appeals dismissing the appeals from District Court orders regarding issues arising under federal law. The Court of Appeals dismissed Smith's appeals on September 20, 1999. This petition has therefore been timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns Smith's attempts to secure appellate review of decisions by the District Court compelling disclosure of his attorney work product to a federal grand jury and refusing to return two inadvertently disclosed, privileged documents. Smith challenges the District Court orders compelling disclosure under both prongs of the crime-fraud exception because the action complained of was not criminal as a matter of law, and because the documents were not generated "in furtherance of" the alleged crime. *See United States v. Zolin*, 491 U.S. 554, 563-64 (1989). Smith maintains that the Court of Appeals erred in refusing to review the District Court's orders. The relevant statute provides as follows:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1291.

STATEMENT OF THE CASE

Procedural History

Smith is an attorney employed by XYZ Corporation. Smith and XYZ Corporation are the targets of a federal grand jury investigation. In response to a grand jury subpoena, XYZ Corporation inadvertently disclosed a privileged and confidential memorandum Smith had prepared in anticipation of litigation. Smith moved the District Court to return the document as privileged work product; however, in an order entered July 2, 1998, the District Court denied the motion.[2/] Based on the inadvertently disclosed memorandum, the government sought to compel production of all of Smith's work product prepared during a privileged environmental compliance investigation pursuant to the crime-fraud exception. On February 18, 1999, after reviewing the documents *in camera*, the District Court granted in part the motion to compel. In addition, in an order entered February 24, 1999, the District Court denied Smith's motion to order the government to return a second document that XYZ Corporation had inadvertently disclosed.

Smith appealed to the Fifth Circuit from the three District Court orders refusing to return the inadvertently disclosed documents and compelling disclosure of other privileged documents. The Court of Appeals consolidated and expedited the appeals. On September 20, 1999, the Court of Appeals dismissed the appeals for lack of jurisdiction. In addition, the Court of Appeals issued a writ of mandamus and ordered the District Court to return the privileged documents to

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[2/] For the sake of brevity, this petition does not refer to XYZ Corporation's pleadings except where necessary.

XYZ Corporation with direction to produce the documents to the United States.

Under Fifth Circuit Rules, when an appeal is dismissed for lack of jurisdiction, the mandate issues immediately. Smith filed an emergency motion to stay and recall the mandate; however, the Court of Appeals denied the motion. App. at 29a. Smith then filed a motion for reconsideration of that decision to enable the Court of Appeals to hear his petitions for rehearing and rehearing *en banc*. The Court of Appeals denied that motion and refused to accept the petitions for rehearing and rehearing *en banc*. App. at 30a.

Facts Material to the Question Presented

The federal grand jury is investigating whether Smith aided XYZ Corporation to violate a reporting requirement of the National Emission Standard for Hazardous Air Pollutants for Benzene Waste Operations, 40 C.F.R. §§ 61.340-61.359 ("Benzene NESHAP"). XYZ Corporation was required to comply with the Benzene NESHAP by January 7, 1995.

[REDACTED: PRIVILEGED]

[REDACTED: PRIVILEGED].

In responding to the subpoena, XYZ Corporation inadvertently produced the document [a privileged memorandum that Smith prepared] to the government. XYZ Corporation discovered the disclosure on May 5, 1998. Both XYZ Corporation and Smith sought the return of the document; however, in an order entered July 2, 1998, the District Court denied XYZ Corporation's and Smith's motions to compel its return. App. at 31a-36a. The District Court found that XYZ Corporation's inadvertent disclosure waived the attorney-client privilege and that the document was not protected by work product immunity. Smith and XYZ Corporation appealed this order.

Relying upon the inadvertently disclosed document as a basis for the crime-fraud exception, the government moved the District Court to compel XYZ Corporation to produce all documents that were responsive to the subpoena but withheld as privileged. After the District Court denied Smith's motion to return the inadvertently disclosed document, it reviewed over 400 privileged documents *in camera* to determine whether the crime-fraud exception overcame the claims of privilege. On February 18, 1999, the District Court found that 214 of the documents were "ultimately used" to circumvent the Benzene NESHAP reporting requirements and should be produced to the government under the crime-fraud exception. App. at 37a-60a. The District Court found that the documents are Smith's work product, generated during the course of his effort to investigate and rectify XYZ Corporation's noncompliance with the

Benzene NESHAP. The District Court stated that it would disclose the documents within ten days. It did not return the documents to XYZ Corporation or otherwise direct that XYZ Corporation produce them to the government. Smith and XYZ Corporation obtained a stay of and appealed this order.

XYZ Corporation inadvertently produced a second legal memorandum by attaching it to a motion it filed regarding the District Court's *in camera* review of Smith's work product.

[REDACTED: PRIVILEGED].

The District Court found that XYZ Corporation's inadvertent production waived any claim of attorney-client privilege, and that the crime-fraud exception defeated work product immunity. As a result, on February 24, 1999, the District Court denied XYZ Corporation's and Smith's motions for return of the document. App. at 61a-71a. Smith and XYZ Corporation appealed this order.

The Court of Appeals consolidated and expedited Smith's and XYZ Corporation's appeals. At oral argument, the Court of Appeals requested supplemental briefing on the government's motion to dismiss the appeal for lack of jurisdiction. On September 20, 1999, the Court of Appeals dismissed the appeal for lack of jurisdiction. *Opinion*, App. at 28a.

The Court of Appeals ruled that the District Court's orders were not final under 28 U.S.C. § 1291. Nor were they appealable under the collateral order doctrine set forth in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949).

In addition, appellate review was precluded at this stage by *Cobbledick v. United States*, 309 U.S. 323, 328 (1940) (holding that the denial of a motion to quash a grand jury subpoena is not final and appealable until the witness disobeys the subpoena and is held in contempt).

As to Smith, the Court of Appeals held further that he did not qualify for appellate review under the exception in *Perlman v. United States*, 247 U.S. 7, 13 (1918) (holding that jurisdiction exists over an appeal regarding a challenge to a grand jury subpoena for documents brought by an interested party who is not in possession of the documents and is not under subpoena). The Court of Appeals reasoned that *Perlman* did not apply because XYZ Corporation, the subpoenaed third party, had a "stake" in protecting the documents from production. *See Opinion*, App. at 20a. The Court of Appeals concluded as follows: "At this stage, [Smith's] interests can only be vindicated, if at all, in an appeal by [XYZ Corporation] over which we have jurisdiction." *Id.* The Court of Appeals stated that if XYZ Corporation wished to appeal regarding the 214 documents, it must disobey the order compelling production and stand in contempt pursuant to *Cobbledick*. In connection with its holding, the Court of Appeals granted mandamus with respect to the District Court's decision to produce the documents in *its* possession directly to the government without holding XYZ Corporation in contempt. Instead, the Court of Appeals ordered the District Court to return the documents to XYZ Corporation and to order XYZ Corporation to produce the documents to the government.[3/]

[3/] On September 24, 1999, the District Court ordered XYZ Corporation to produce the documents to the government. XYZ Corporation disobeyed the order, and the District Court held XYZ Corporation in contempt. Once the District Court fined XYZ Corporation (continued...)

REASONS FOR GRANTING THE WRIT

The Court should grant Smith's petition for a writ of certiorari (1) to correct the Court of Appeals' decision which is contrary to Supreme Court precedent; (2) to resolve the conflict in the circuits regarding the *Perlman* doctrine; and (3) to preserve the attorney work product doctrine, a fundamental component of the American legal system.

I. THE COURT SHOULD GRANT THE PETITION BECAUSE THE COURT OF APPEALS' DECISION IS CONTRARY TO SUPREME COURT PRECEDENT

The decision of the Court of Appeals is contrary to *Perlman*. The Court of Appeals erroneously held that the three District Court orders were not "final" under the *Perlman* doctrine, thus depriving Smith of appellate review. In two of the three orders, the District Court refused to compel the government to return documents inadvertently produced by XYZ Corporation. In the third order, the District Court stated that it would turn the documents over to the government within ten days. In all three instances, Smith's work product was out of his custody and control. Like *Perlman*, he was "powerless

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[1] (...continued)
$200,000 per day for its contempt and the Court of Appeals refused to stay the fine, XYZ Corporation produced the documents to the government. The Court of Appeals denied Smith's request for an injunction preventing the government from reviewing the documents.

Given the continuing injury to Smith, his appeal is not moot. *See Church of Scientology v. United States*, 506 U.S. 9, 13 (1992) (holding that appeal was not moot even though subpoenaed materials had been produced to the government because court could effect partial remedy and prevent further injury and taint to the proceedings by ordering the government to return or destroy all copies).

to avert the mischief" of their disclosure, 247 U.S. at 13, and certiorari should thus be granted.[4/]

The District Court orders were final and appealable because there was no further action for the District Court to take. *See* 28 U.S.C. § 1291. A ruling is "final" when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Cunningham v. Hamilton County*, 119 S. Ct. 1915, 1919-20 (1999) (citations omitted). In general, a discovery order is not considered final because "a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981). In other words, an order to produce documents to the grand jury is ordinarily not final because the potential exists for an additional proceeding before the district court: the witness may stand in contempt rather than produce the documents, and the underlying order may then be reviewed as final. *See Cobbledick*, 309 U.S. at 327-28.

This Court has long recognized, however, situations where an interested party lacks the ability to take contempt and appeal a discovery order. Under those circumstances, the order is final and appealable as to that party because there are no further decisions for the district court to render; there is "nothing for the court to do but execute the judgment." *Cunningham*, 119 S. Ct. at 1920. The Court recognized this

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[4/] The work product doctrine creates a legally protectable interest in both attorney and client, either of whom may assert it on his own behalf. *In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994) (reviewing attorneys' claims of work product protection even though clients waived attorney-client privilege); *see also Moody v. IRS*, 654 F.2d 795, 801 (D.C. Cir. 1981) ("the work product privilege creates a legally protectable interest in non-disclosure in two parties: lawyer and client").

rule of finality in *Perlman*, 247 U.S. at 13. There, the Court reviewed an order to produce to the grand jury Perlman's documents which were in the possession of the district court after a related civil trial. Perlman asserted that producing the documents would violate his Fourth and Fifth Amendment rights. *Perlman*, 247 U.S. at 13. The government argued that " '[t]he order of the District Court if considered as part of the criminal proceeding is not final, but merely interlocutory, and therefore not reviewable' " on appeal. *Perlman*, 247 U.S. at 12. Rejecting this argument, the Court stated as follows:

> The . . . contention of the government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur.

Perlman, 247 U.S. at 13.

This is precisely Smith's situation. The District Court stated that it would produce Smith's work product documents that it held as a result of conducting the *in camera* review. While the decision of the Court of Appeals provided XYZ Corporation with the contempt route to appellate review, Smith had no such recourse.[5/] No further District Court action can

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[5/] No potential for contempt existed with respect to the inadvertently disclosed documents because they were in the government's possession. Nevertheless, the Court of Appeals did not even address (continued...)

occur with respect to Smith's assertion that his work product is immune from production. Smith's appeal therefore fits squarely within the rule of finality recognized by the Court in *Perlman*, and by numerous other circuits.[6] The Court should grant this petition for a writ of certiorari to correct the Court of Appeals' decision, which is contrary to *Perlman*.

The Court of Appeals attempted to narrow *Perlman* to situations in which the party in possession of the documents is "disinterested" and cannot be expected to risk contempt for the putative privilege holder. *See Opinion*, App. at 19a. Stating that XYZ Corporation could be expected to represent Smith's interest in the documents because they are both targets of the grand jury investigation, the Court held that, at that "stage" in the proceedings, there was no jurisdiction over Smith's appeals. *Opinion*, App. at 20a. *Perlman* contains no such requirement. The Court of Appeals relied mistakenly, however, on two opinions of this Court to fashion a rule that an attorney cannot obtain appellate review of his claim of work product immunity when the subpoenaed party "ha[s] a stake in keeping the documents at issue here from production." *See Opinion*, App. at 20a.[7] However, this Court, and numerous circuits, have

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[5] (...continued)
Smith's arguments that it had jurisdiction over his appeals involving those documents.

[6] *See* Section II, *infra*, and cases cited therein.

[7] *See, e.g., Church of Scientology*, 506 U.S. at 18 n.11 (relying on treatise for dicta that *Perlman* applies when "a discovery order [is] directed at a disinterested third party"); *Pennsylvania v. Ritchie*, 480 U.S. 39, 77 n.3 (1987) (stating, in dissent, that *Perlman* applies when the third party "has no independent interest in preserving their confidentiality."). Neither decision held, however, that one who has a "stake in keeping the documents
(continued...)

never so limited *Perlman*.[8/] Moreover, Smith and XYZ Corporation have independent interests in protecting the work product. *See In re Sealed Case*, 676 F.2d 793, 809 & n.56 (D.C. Cir. 1982) (holding that lawyer and client often have different interests in and different reasons for protecting work product).

The Court of Appeals fundamentally misconstrued Smith's and XYZ Corporation's interests in the grand jury investigation. Although both are targets, their interests are different: only Smith can be incarcerated, and XYZ Corporation may not vindicate the interests of one employee over the interests of the company and its shareholders. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993). Thus, Smith's right to assert work product immunity cannot depend on XYZ Corporation's willingness to assert it. *See In re Grand Jury*, 111 F.3d 1066, 1077 (3d Cir. 1997) ("the target['s] . . . opportunity for appellate review should not be dependent on [a witness's] willingness to [take contempt]").

The Court of Appeals went to great lengths to deny appellate jurisdiction to Smith to prevent what it viewed as a "backdoor around the *Cobbledick* doctrine" that would avoid a contempt citation to his employer, and would permit "immediate appeal . . . *any* time *any* non-subpoenaed party could claim *any* stake in the resolution of the contested order."

[7/] (...continued)
. . . from production" cannot be "disinterested." *See Opinion*, App. at 20a.

[8/] *See* Section II, *infra*, and cases cited therein.

See Opinion, App. at 20a (emphasis added).[2/] However, the Court of Appeals may not refuse to follow *Perlman* in order to limit its prospective caseload or otherwise. Indeed, the Court stated in *Cobbledick* as follows:

> If [the] production [of documents] before the grand jury violated Perlman's constitutional right then he could protect that right only by a separate proceeding to prohibit the forbidden use. To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim.

Cobbledick, 309 U.S. at 328-29. Similarly, the Court of Appeals wrongly denied Smith appellate review of his work product immunity claim. There is no basis under 28 U.S.C. § 1291 or this Court's precedent for this result. This Court should grant the petition for a writ of certiorari to correct the Court of Appeals' decision which eviscerates the *Perlman* doctrine.

[2/] The Court of Appeals' concern that allowing appellate review of Smith's claim of work product immunity would open the floodgates to unlimited litigation is misplaced. To the contrary, as the Second Circuit has held, immediate appeal lies in cases involving common law privileges and constitutional rights. *In re Subpoenas to Local 478, Int'l Union of Operating Engineers and Benefit Funds*, 708 F.2d 65, 71-72 (2d Cir. 1983). Work product is a fundamental component of our legal system and satisfies the requirement for *Perlman* jurisdiction. *See Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

II. THE COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT IN THE CIRCUITS

The Court should grant this petition because the Court of Appeals' decision conflicts with decisions of other circuits. Applying *Perlman* to appeals by non-subpoenaed parties, three circuits hold that there is appellate jurisdiction when it is not known whether the witness will stand in contempt, or when the appellant cannot control the witness's decision. *See In re Grand Jury Subpoenas*, 123 F.3d 695, 698-99 (1st Cir. 1997) (permitting appeal by grand jury target from order denying motion to quash subpoena even though witness had not been held in contempt); *In re Federal Grand Jury Proceedings (FGJ 91-9)*, 975 F.2d 1488, 1491-92 (11th Cir. 1992) (asserting jurisdiction over third party's appeal when unclear whether witness would take contempt); *In re Grand Jury Matter, John F. Kennedy Memorial Hospital*, 802 F.2d 96, 99 (3d Cir. 1986) (holding order quashing subpoena to hospital final as to appellant who was president of entity that owned hospital and chairman of the hospital's board of directors because he could not control his employer's decision whether to produce the documents). Similarly, here it was not known whether XYZ Corporation would stand in contempt, nor did Smith have control over XYZ Corporation's decision regarding contempt. Consequently, *Perlman* applied.

Furthermore, four other circuits have followed *Perlman* and held that jurisdiction existed over appeals by non-subpoenaed parties when the witnesses declined to stand in contempt. *See In re Grand Jury Subpoenas Dated December 7 and 8*, 40 F.3d 1096, 1099 (10th Cir. 1994) (asserting jurisdiction over third party's appeal when witness would not take contempt); *In re Grand Jury Subpoenas Dated December 10, 1987*, 926 F.2d. 847, 853 (9th Cir. 1991) (holding that *Perlman* applied to an intervenor's appeal because the witness

complied with the subpoena); *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (reviewing grand jury target's appeal after witnesses stated that they would not stand in contempt); *Velsicol Chemical Corp. v. Parsons*, 561 F.2d 671, 674 (7th Cir. 1977) (holding that grand jury target could appeal order directing witness to testify when witness stated intent to comply with order). The reasoning of all seven circuits comports with the principle of *Perlman* that an order is final as to an interested party that has no other recourse in the District Court.

Here, the Fifth Circuit has departed from the other circuits. It stands alone in its rejection of *Perlman*. The Court of Appeals stated that "[a]t this stage, [Smith's] interests can only be vindicated, if at all, *in an appeal by [XYZ Corporation]* over which we have jurisdiction," referring to an appeal from a finding of contempt against XYZ Corporation. *Opinion*, App. at 20a (emphasis added). As a result, if XYZ Corporation did not stand in contempt or did not appeal from a finding of contempt, Smith could never obtain appellate review. Moreover, the Court of Appeals is unique in requiring that the subpoenaed party in possession of the documents must be "disinterested" as to the appellant. The import of the Court of Appeals' decision -- that a nonsubpoenaed, interested party not in possession of the documents at issue may not appeal -- conflicts with *Perlman* and seven circuits. Consequently, the Court should grant this petition for a writ of certiorari.

III. THE COURT SHOULD GRANT THE PETITION TO PRESERVE THE ATTORNEY WORK PRODUCT DOCTRINE

The Court should grant the petition because the Court of Appeals has undermined the work product doctrine, a fundamental component of the American legal system. *See Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981)

(emphasizing that "strong public policy" underlies the work product doctrine) (citations omitted); *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) (establishing work product doctrine and reasoning that an attorney needs privacy to "work for the advancement of justice while faithfully protecting the rightful interests of his clients."). As this Court explained,

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman, 329 U.S. at 511. In *In re Richard Roe, Inc.*, 168 F.3d 69, 71 (2d Cir. 1999), the Second Circuit stated that exceptions to work product immunity and the attorney-client privilege are limited and "should not be framed so broadly as to vitiate much of the protection [the privileges] afford." The Court of Appeals' refusal to review Smith's claim of work product immunity was contrary to the prevailing jurisprudence throughout the circuits.[10/]

[10/] *See, e.g., In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 924 (8th Cir. 1997) (reviewing claim that work product immunity protected notes of White House attorneys from disclosure); *Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990) (holding that Department of Justice waived claim that its memorandum was protected work product); *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986) (reviewing claim (continued...)

In refusing to review Smith's appeal, the Court of Appeals applied a different rule to Smith because he is an "attorney-employee" rather than a retained outside attorney. *See Opinion*, App. at 19a-20a.[11/] The Court of Appeals' opinion is founded on a flawed conclusion that Smith has no independent interest in the documents because his client is also his employer. *See Opinion*, App. at 20a. The Court of Appeals has thus established a special jurisdictional element for in-house attorneys based on reasoning no other circuit has adopted: appellate review under *Perlman* is not available for in-house attorneys attempting to protect their work product from production by their client-employer in response to grand jury subpoenas. Under the Court of Appeals' analysis, a corporate employer is presumed willing to stand in contempt to protect its in-house attorney's work product from disclosure because the employer is a grand jury target. This rule sets the

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[10/] (...continued)
that crime-fraud exception compelled disclosure of work product); *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 62 (7th Cir. 1980) (analyzing crime-fraud exception where district court quashed grand jury subpoena for law firm's work product); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 801 & n.4 (3d Cir. 1979) (holding that client may assert work product immunity as defense to grand jury subpoena).

[11/] The Court of Appeals distinguished an earlier decision in which it reviewed an appeal by a client, a "powerless third party," from an order compelling his retained attorney to testify before the grand jury. *See Opinion*, App. at 19a (quoting *In re Grand Jury Proceedings in the Matter of Fine*, 641 F.2d 199, 202 (5th Cir. 1981)). In distinguishing *Fine*, the Court of Appeals stated that " 'a variety of other results and remedies are available in cases outside of the standard attorney-client relationship.' " *See Opinion*, App. at 19a (quoting *Fine*, 641 F.2d at 203 n.3). The Court of Appeals then assumed without discussion that XYZ Corporation would represent Smith's interests in protecting the documents because XYZ Corporation and Smith are both targets of the grand jury investigation. No basis existed, however, for that assumption.

Court of Appeals apart from other circuits that follow the traditional view of the *Perlman* doctrine under which appellate jurisdiction is available to review a claim by a non-subpoenaed party that the subpoenaed material is privileged.[12/]

The impact of the Court of Appeals' decision will not be limited to Smith. Rather, the decision will have a chilling effect on in-house attorneys doing privileged compliance investigations. They will know that their work product is subject to grand jury subpoenas with no chance of appellate review. The decision will discourage other in-house attorneys from investigating and working to remedy possible non-compliance. Thus, the rule that the Court of Appeals devised will subvert public policy, which favors internal compliance investigations. *See, e.g., Upjohn*, 449 U.S. at 394 n.2 ("the depth and quality of any investigations . . . to ensure compliance with the law would suffer"); *In re International Systems & Controls Corp. Securities Litigation*, 693 F.2d 1235, 1243 (5th Cir. 1982) (encouraging companies to "investigate past and present questionable practices," and permitting companies to maintain the confidentiality of counsel's work product). The Court of Appeals has thus undermined the ultimate goal of corporate compliance.

Smith submits that the Court of Appeals has misconstrued *Perlman*, denied the assertion of work product immunity by attorneys generally, and created a unique and more onerous regime for in-house attorneys. The Court should grant the petition to resolve the conflict in the circuits, and to review the Court of Appeals' undermining of the attorney work product doctrine.

[12/] *See* Section II, *supra*, and cases cited therein.

CONCLUSION

In rejecting the holding of *Perlman*, the Court of Appeals conflicts with seven other circuits, fashioning a special rule for in-house attorneys that denies them the ability to protect their own work product. Accordingly, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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December 20, 1999

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 98-40870, 99-40262, and 99-40271

In Re: GRAND JURY SUBPOENA.

Appeals from the United States District Court
for the Southern District of Texas

FILED SEP 20 1999
CHARLES R. FULBRUGE III
CLERK

Before KING, Chief Judge, and SMITH and BARKSDALE, Circuit Judges.

KING, Chief Judge:

In these consolidated appeals, Appellants, targets of an ongoing grand jury investigation, challenge three district court orders: two denying Appellants' motions to return documents turned over to Appellee in the process of complying with a grand jury subpoena (Nos. 98-40870 and 99-40271) and one granting Appellee's motion to compel production of certain documents under the subpoena (No. 99-40262). We dismiss all three appeals for want of jurisdiction and, as to No. 99-40262, grant mandamus.

I. FACTUAL AND PROCEDURAL BACKGROUND

Corporate Appellants[1] operate plants in south Texas and are subject to compliance with and reporting under federal regulations that set standards with regard to the emission of certain pollutants (the "Regulations").[2] Individual Appellant ("Individual Appellant" or, with Corporate Appellants, "Appellants")[3] is an attorney and an employee of Corporate Appellants. In June 1996, a federal grand jury issued a subpoena duces tecum to Corporate Appellants requiring the production of all documents from January 1, 1990, onward relating to Corporate Appellants' compliance with and reporting under the Regulations. Corporate Appellants notified certain employees, including Individual Appellant, of the subpoena and requested that each employee forward to a custodian of records documents that the employee deemed responsive to the subpoena.

A. No. 98-40870

Individual Appellant forwarded to the custodian a number of files containing documents he deemed responsive. One of the forwarded files was marked, "NOTE: ALL

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[1] Corporate Appellants are related corporations designated as Sealed Appellants 2 and 3 in No. 98-40870 and as Sealed Appellants 1 and 2 in Nos. 99-40262 and 99-40271. They will be referred to as Corporate Appellants throughout this opinion.

[2] Appellants are the targets of an ongoing grand jury investigation, and the record has been sealed. Therefore, certain facts will be abbreviated in order to maintain the anonymity of the parties and the confidentiality of the ongoing grand jury investigation.

[3] Individual Appellant is designated as Sealed Appellant 1 in No. 98-40870 and as Sealed Appellant 3 in Nos. 99-40262 and 99-40271. He will be referred to as Individual Appellant throughout this opinion

DOC[UMENT]S SHOULD BE CONSIDERED ATTORNEY-CLIENT, WORK-PRODUCT PRIVILEGED." This file contained, among other things, a two-page document (the "Document") bearing the header, "ATTORNEY-CLIENT PRIVILEGE/WORK PRODUCT IMMUNITY; PLEASE KEEP CONFIDENTIAL AND LIMIT DISTRIBUTION."

Prior to producing any documents under the subpoena, Corporate Appellants claim to have "implemented measures reasonably calculated to locate responsive documents and remove privileged ones from production." Brief for Corporate Appellants at 9 (No. 98-40870). In October 1996, Corporate Appellants produced approximately 5,000 documents in response to the subpoena, including the Document. In May 1998, during a conversation with a Department of Justice attorney for the United States ("Appellee" or the "Government"), outside counsel for Corporate Appellants learned that the Document had been turned over more than a year-and-a-half earlier. Corporate Appellants quickly requested, in writing, return of the Document under a claim of privilege. The Government responded that the Document did not appear to be privileged, and that if privileged, the privilege was waived by intentional disclosure and by the crime-fraud exception to the attorney-client privilege.

Later that same month, Corporate Appellants filed a motion in the district court to compel return of the Document. Individual Appellant intervened and filed his own motion to compel return of the Document under a claim of work product immunity.

In July 1998, the district court issued an order denying both motions. The court found that any attorney-client

privilege that may have existed was waived by Corporate Appellants' intentional production of the Document and that the Document was not prepared in anticipation of litigation and contained "only a summary of events and g[ave] no indication of [Individual Appellant's] mental impressions, opinions, conclusions, judgments or legal theories" and, therefore, was not immune from disclosure as attorney work product.[4] Corporate Appellants and Individual Appellant timely appealed the district court's order. This appeal is the subject of No. 98-40870.

B. No. 99-40262

In its response to Corporate Appellants' May 1998 motion to compel return of the Document, the Government moved the district court to compel Corporate Appellants to produce, for in camera inspection, all evidence being withheld under a claim of privilege to determine the extent to which the crime-fraud exception defeated the claimed privilege. On July 31, 1998, the district court granted the Government's motion. Individual Appellant has asserted that many of the documents submitted for in camera review were also protected by work product immunity.

After reviewing the documents submitted for in camera inspection, the district court, in an order entered on February 18, 1999, found that the documents were protected by the attorney-client privilege and assumed that they were protected by the work product doctrine. The court, however, further found that the crime-fraud exception defeated any privilege or immunity. In the alternative, the court found that

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[4] The court never reached the issues of attorney-client privilege or the crime-fraud exception to attorney-client privilege and work product immunity.

Corporate Appellants waived their attorney-client privilege with regard to the documents by injecting the reasonableness of their reliance on the documents into the litigation. The court granted the Government's motion to compel production of over 200 documents and stated, "In ten days of issuance of this Order, the Court will make said documents available to the Government and will return the remaining in camera documents to [Corporate Appellants]." Both Corporate Appellants and Individual Appellant timely appealed this order in No. 99-40262.

C. No. 99-40271

On September 1, 1998, Corporate Appellants had filed a motion, which was later granted, for the return of certain documents submitted for in camera review that were non-responsive to the original grand jury subpoena. Following their points and authorities in support of this motion, Corporate Appellants inadvertently attached a memorandum (the "Memorandum") that they claim is protected by attorney-client privilege. Individual Appellant claims the Memorandum is his protected work product. Corporate Appellants and Individual Appellant each moved to compel return of the Memorandum.

In an order entered on February 22, 1999, denying Corporate Appellants' and Individual Appellant's motions to compel return of the Memorandum, the district court found that the Memorandum was the work product of the in-house attorney by whom it was prepared and that it was protected by attorney-client privilege in the hands of Corporate Appellants. However, the court found that the attorney-client privilege and work product immunity were waived by the inadvertent disclosure of the Memorandum. The court further found that the Memorandum was not the work

product of Individual Appellant and that if it were, it nonetheless fell under the crime-fraud exception to work product immunity. Both Corporate Appellants and Individual Appellant timely appealed this order in No. 99-40271. On April 1, 1999, the three appeals were consolidated and ordered expedited.

II. BACKGROUND

The first, and conclusive, issue before us in these appeals is that of jurisdiction: Are the pre-indictment discovery orders[5] of the district court appealable?[6] We begin our discussion of this issue with first principles.

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[5] The orders at issue in these appeals are all pre-indictment discovery orders. Each order is the equivalent of an order denying a motion to quash the grand jury subpoena as it relates to the document or documents at issue. *See In re Grand Jury Proceedings Involving Berkley and Co.*, 629 F.2d 548, 551 (8th Cir.1980) ("The district court's order rejecting Berkley's claim of privilege and ordering disclosure of documents to the grand jury is the functional equivalent of an order denying a motion to quash a grand jury subpoena.").

[6] On February 10, 1999, a motions panel of this court denied the Government's motion to dismiss No. 98-40870 for lack of jurisdiction. In this circuit, an oral argument panel is not bound by a motions panel's denial of a motion to dismiss. *See Ventana Invs. v. 909 Corp.*, 65 F.3d 422, 425 n.7 (5th Cir.1995) (citing *EEOC v. Neches Butane Prods. Co.*, 704 F.2d 144, 147 (5th Cir.1983) ("A denial by a motions panel of a motion to dismiss for want of jurisdiction, however, is only provisional. With the benefit of full briefing and (as was the case here) oral argument, the panel to which the case falls for disposition on the merits may conclude that the motions decision was improvident and should be reconsidered.")). Therefore, the motions panel's denial of the Government's motion to dismiss No. 98-40870 is subject to reconsideration by this panel.

A. Finality

Except in certain circumstances not applicable here, this court's jurisdiction is limited to "final decisions" of the district court. 28 U.S.C. § 1291 (1994).[7] Recently, the Supreme Court explained the finality requirement:

> Section 1291 of the Judicial Code generally vests courts of appeals with jurisdiction over appeals from "final decisions" of the district courts. It descends from the Judiciary Act of 1789 where "the First Congress established the principle that only 'final judgments and decrees' of the federal district courts may be reviewed on appeal." In accord with this historical understanding, we have repeatedly interpreted § 1291 to mean that an appeal ordinarily will not lie until after final judgment has been entered in a case . . . . Consistent with these purposes, we have held that a decision is not final, ordinarily, unless it " 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' "

Cunningham v. Hamilton County, 119 S. Ct. 1915, 1919-20 (1999) (internal citations omitted) (quoting *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988)).

Pre-trial discovery orders are generally no exception to the finality requirement. Courts have "denied [immediate] review of . . . [such orders because,] in the rare case when

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[7] Section 1291 provides, in part, "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."

appeal after final judgment will not cure an erroneous discovery order, a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981).

Three arguments are often advanced to justify the finality requirement. First, "[i]t helps preserve the respect due trial judges . . . ." *Flanagan v. United States*, 465 U.S. 259, 263 (1984). "Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system." *Firestone*, 449 U.S. at 374. Second, the requirement minimizes a party's opportunities to defeat the valid claims of his opponents through an endless barrage of appeals. As Justice Frankfurter explained nearly 60 years ago, "[the finality requirement] avoid[s] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Cobbledick*, 309 U.S. 323, 325 (1940). Finally, the rule promotes efficiency by removing obstacles that work to impede judicial process. "To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause." *Id.*

In our legal system, "the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice." *Id.* Therefore, requiring an individual to await final judgment before advancing an appeal does not, in and of itself, deny justice; in determining what justice requires, courts must balance the costs the individual must bear in awaiting final judgment against the societal and institutional hardships caused by allowing an immediate

appeal. These hardships are significant, and hence the finality requirement is particularly important, in the area of criminal law. *See United States v Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) ("This Court has long held that [the doctrine of finality] is inimical to piecemeal appellate review of trial court decisions which do not terminate the litigation, and that this policy is at its strongest in the field of criminal law . . . ."); *DiBella v. United States*, 369 U.S. 121, 126 (1962) ("[T]he delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law."); *Cobbledick*, 309 U.S. at 325 ("These considerations of policy are especially compelling in the administration of criminal justice."). The particular importance of the finality requirement in administering the criminal law is derived from both the accused's Sixth Amendment right to, and society's independent interest in, a speedy trial:

> As time passes, the prosecution's ability to meet its burden of proof may greatly diminish: evidence and witnesses may disappear, and testimony becomes more easily impeachable as the events recounted become more remote. Delay increases the cost of pretrial detention and extends "the period during which defendants released on bail may commit other crimes." Delay between arrest and punishment prolongs public anxiety over community safety if a person accused of a serious crime is free on bail. It may also adversely affect the prospects for rehabilitation. Finally, when a crime is committed against a community, the community has a strong collective psychological and moral interest in swiftly bringing the person responsible to justice. Prompt acquittal of a person wrongly accused,

> which forces prosecutorial investigation to continue, is as important as prompt conviction and sentence of a person rightly accused. Crime inflicts a wound on the community, and that wound may not begin to heal until criminal proceedings have come to an end.

Flanagan, 465 U.S. at 264-65 (internal citation omitted) (quoting *United States v. MacDonald*, 435 U.S. 850, 862 (1978)).

The need to limit delay is no less compelling in the pre-indictment context of a grand jury proceeding than it is in the criminal trial that may follow. "Opportunity for obstructing the 'orderly progress' of investigation should no more be encouraged in one case than in the other. That a grand jury proceeding has no defined litigants and that none may emerge from it, is irrelevant to the issue." *Cobbledick*, 309 U.S. at 327-28 (quoting *Segurola v. United States*, 275 U.S. 106, 112 (1927)). Whether pre- or post-indictment, neither convenience nor expediency alone can ever justify immediate appeal without a final judgment in the underlying proceeding. Indeed, "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Id.* at 325.

Despite the weighty considerations favoring denial of appeals before a final judgment is rendered in the district court, however, there exist rare instances in which pre-final judgment review is allowed. Two doctrines used to determine the appropriateness of immediate appeal in certain classes of cases warrant discussion here: the collateral order doctrine and the *Cobbledick* doctrine.

B. The Collateral Order Doctrine

The collateral order doctrine descends from the case of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Claiming diversity jurisdiction, Cohen filed a derivative action in federal district court against Beneficial and certain of its managers and directors for mismanagement and fraud. While the action was pending, New Jersey, the forum state, passed a law making plaintiffs with limited corporate holdings liable for expenses in unsuccessful derivative actions. The law allowed the corporation to require a security, and it applied to pending cases. Beneficial moved to require security, and the district court, being of the opinion that the new law was inapplicable to cases pending in federal court, denied the motion. Beneficial appealed, and the Supreme Court found jurisdiction because the case fell "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546.

Recent Supreme Court cases invoking the collateral order doctrine have clarified the rule as providing "that certain orders may be appealed, notwithstanding the absence of final judgment, but only when they 'are conclusive, . . . resolve important questions separate from the merits, and . . . are effectively unreviewable on appeal from the final judgment in the underlying action.'" *Cunningham*, 119 S. Ct. at 1919 (alterations in original) (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995)).

The collateral order doctrine is rarely applied in criminal cases:

> We have interpreted the collateral order exception "with the utmost strictness" in criminal cases. Although we have had numerous opportunities in the 40 years since *Cohen* to consider the appealability of prejudgment orders in criminal cases, we have found denials of only three types of motions to be immediately appealable: motions to reduce bail, motions to dismiss on double jeopardy grounds, and motions to dismiss under the Speech or Debate Clause.

Midland Asphalt, 489 U.S. at 799 (internal citations omitted) (quoting *Flanagan*, 465 U.S. at 265). Denial of a motion to reduce bail becomes truly moot if the accused must wait until the conclusion of trial to appeal the order. The right guaranteed by the Speech and Debate and Double Jeopardy Clauses is, at its most basic level, the right not to have to stand trial. *See Flanagan*, 465 U.S. at 266 (declining to extend the collateral order doctrine to an order disqualifying counsel in a criminal case).

C. The *Cobbledick* Doctrine and the *Perlman* Exception

In *Cobbledick v. United States*, 309 U.S. 323 (1940), the appellant was subpoenaed to appear and produce certain documents before a grand jury. He moved the district court to quash the subpoena, but the motion was denied, and Cobbledick appealed. The Supreme Court held that the order lacked the finality requisite for an appeal, and the appellant could secure a right of immediate appeal only by defying the order, being held in contempt, and appealing the contempt order. "Whatever right he may have requires no further protection . . . than that afforded by the district court until the witness chooses to disobey and is committed for contempt. At that point the witness' situation becomes so severed from

the main proceeding as to permit an appeal." *Cobbledick*, 309 U.S. at 328 (internal citation omitted).[8] The rule established in *Cobbledick* has long been followed in this circuit. *See, e.g., United States v. Grand Jury*, 425 F.2d 327 (5th Cir. 1970).

There is, however, an exception to the strict requirements of the *Cobbledick* doctrine. In *Perlman v. United States*, 247 U.S. 7 (1918), appellant Perlman brought suit against Standard Welding for patent infringement and won. During the trial, Perlman had offered certain exhibits into evidence. Later, Perlman's company brought an infringement suit

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[8] The fact that the *Cobbledick* doctrine entails raising the validity of the underlying order in an appeal of a contempt citation suggests that the collateral order doctrine is an inappropriate alternative in situations where the *Cobbledick* doctrine applies. If the collateral order doctrine were an appropriate alternative, the original order would itself be appealable, and waiting to challenge it in an appeal of a contempt citation would be disallowed, thereby nullifying the *Cobbledick* doctrine. *See United States v. Ryan*, 402 U.S. 530, 532 n.4 ("*Walker v. Birmingham* . . . is not to the contrary. Our holding that the claims there sought to be asserted were not open on review of petitioners' contempt convictions was based upon the availability of review of those claims at an earlier stage."); *see also United States v. Pearce*, 792 F.2d 397 (3d Cir. 1986). In that case, Pearce refused to testify before a grand jury because he felt his plea agreement excused his testimony, and criminal contempt proceedings were commenced against him. At his contempt trial, the district court refused to allow him to raise the invalidity of the underlying order to compel testimony as a defense. The Court of Appeals for the Third Circuit held that the defense could be raised:

> The rule is that when an order is appealable, and one foregoes the appeal, he may not raise the validity of the order at a subsequent contempt trial; however, if the order is not appealable, and compliance with it will bring irreparable harm, the individual has the option of disobeying the order and raising its invalidity as a defense in subsequent contempt proceedings.

Id. at 400.

against Firestone, which was eventually dismissed without prejudice under the condition that certain evidence, including the exhibits used in the first suit against Standard Welding, be impounded in the custody of the clerk of the court and kept under seal. The government attempted to gain possession of the exhibits in furtherance of a grand jury investigation of Perlman, and Perlman attempted to restrain the government's use of the exhibits. He was unsuccessful in the district court, so he appealed to the Supreme Court. The government moved to dismiss the appeal for lack of jurisdiction on the grounds that the order of the district court was not final. The Supreme Court disagreed:

> The second contention of the Government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur.

Id. at 12-13. As the Court explained in *Cobbledick*, "Perlman's exhibits were already in the court's possession. If their production before the grand jury violated Perlman's constitutional right then he could protect that right only by a separate proceeding to prohibit the forbidden use." 309 U.S. at 328.

The *Perlman* exception has come to stand for the proposition that a party opposing a discovery order need not stand in contempt "where the documents at issue are in the hands of a third party who has no independent interest in preserving their confidentiality." *Pennsylvania v. Ritchie*,

480 U.S. 39, 77 n.3 (1987) (Stevens, J., dissenting); *see also Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992) ("However, under the so-called *Perlman* doctrine, a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceedings to risk contempt by refusing compliance." (internal citation omitted)); *United States v. Ryan*, 402 U.S. 530, 533 (1971) ("To have denied review would have left Perlman 'powerless to avert the mischief of the order,' for the custodian could hardly have been expected to risk a citation for contempt in order to secure Perlman an opportunity for judicial review." (quoting *Perlman*, 247 U.S. at 13)). It is well-established in this circuit that the subpoenaed third party's lack of interest in protecting the confidentiality of the subpoenaed documents is the touchstone of the *Perlman* inquiry. *See, e.g., In re Grand Jury Proceedings in the Matter of Fine*, 641 F.2d 199, 201 (5th Cir. 1981) ("[The reasoning supporting the *Cobbledick* doctrine] does not hold as firmly when the subpoenaed party is one who has no direct and personal interest in the suppression of the information desired by the grand jury.").[9]

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[9] The Court of Appeals for the Eleventh Circuit has remarked, "And the subpoenaed party, unless he has either a particularly close relationship to the putative privilege-holder or a personal interest in nondisclosure of the material, is unlikely to risk a contempt citation simply to vindicate the rights of a third party." *In re Grand Jury Proceedings*, 832 F.2d 554, 558 (11th Cir. 1987). Similarly, the Court of Appeals for the Second Circuit has stated, "There is an exception to [the *Cobbledick* doctrine], however[,] 'where the subpoena is directed against a third party [who is unlikely to risk being held in contempt to vindicate someone else's rights] . . . .'" *In re Grand Jury Subpoena Duces Tecum Dated May 29, 1987*, 834 F.2d 1128, 1130 (2d Cir. 1987) (second alteration in original) (quoting *In re Katz*, 623 F.2d 122, 124 (2d Cir. 1980)).

In *Fine*, we adopted the rule that a client-intervenor who claims her own interest or privilege may appeal an order compelling her innocent attorney to testify before a grand jury, even though the attorney has not refused compliance and been held in contempt. *See id.* at 203.[10] We were quick to explain in that opinion that "[o]ur reasoning applie[d] only to the normal attorney-client relationship, and would not extend to situations where the client will not lose meaningful appeal of the issue or where the client exercises more direct control and responsibility for the actions of the attorney." *Id.* at 203 n.3.

Against this doctrinal backdrop, we proceed to a determination of our jurisdiction to entertain the appeals before us.

III. JURISDICTION IN THE INSTANT APPEALS

A. The *Cohen* Collateral Order Doctrine

Appellants assert that jurisdiction lies in the instant appeals by application of the collateral order doctrine. The Government contests that assertion. The parties' dispute centers on the exact test applied in this circuit to determine whether a district court order is directly appealable under the collateral order doctrine and whether or not the appeals at hand satisfy that test. We need not address this debate, however, because we find the doctrine inapplicable here.

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[10] Most other circuits have adopted a similar rule. *See In re Grand Jury Subpoenas*, 123 F.3d 695 (1st Cir. 1997) (also collecting cases); *In re Grand Jury Subpoena*, 784 F.2d 857 (8th Cir. 1986); *Matter of Klein*, 776 F.2d 628 (7th Cir. 1985); *United States v. (Under Seal)*, 748 F.2d 871 (4th Cir. 1984); *In re Grand Jury Proceedings*, 722 F.2d 303 (6th Cir. 1983); *In re Grand Jury Proceedings*, 689 F.2d 1351 (11th Cir. 1982); *In re Katz*, 623 F.2d 122 (2d Cir. 1980); *In re Grand Jury Proceedings*, 604 F.2d 798 (3d Cir. 1979).

First, the collateral order doctrine requires, in part, that the appealed issue be separate from the "merits of the action." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (citing *Abney v. United States*, 431 U.S. 651, 658 (1977); *MacDonald*, 435 U.S. at 855). In all three cases where the Supreme Court has found the collateral order doctrine applicable in the criminal context, the appeal was filed post-indictment. Pre-indictment, it is conceptually difficult to identify any "action" from the merits of which the appeal is separate, and it is, therefore, at least in the ordinary case, equally difficult to find that this prong of the collateral order doctrine has been satisfied. Even if the grand jury proceeding is identified as the "action" at issue, it occurs in secret, leaving this court with no record to use in determining whether or not the contested order is collateral to the proceeding. Satisfying this prong of the collateral order doctrine is particularly problematic in these appeals because the district court found the crime-fraud exception overrode Appellants' claims of privilege and immunity, and Appellants challenge that finding by arguing that their actions did not constitute a crime. Reaching their contention might well place us at the very heart of the grand jury's investigation, at least insofar as we can tell.

Second, it is inappropriate to apply the collateral order doctrine to these appeals because, at least in cases contesting pre-indictment discovery orders, jurisdiction is more appropriately determined by application of the *Cobbledick* doctrine. As the Supreme Court has stated:

> [W]e have permitted appeals prior to criminal trials [under the collateral order doctrine] when a defendant has claimed that he is about to be subjected to forbidden double jeopardy, or a violation of his constitutional right to bail, because

> those situations, like the posting of security for costs involved in *Cohen*, "each involved an asserted right the legal and practical value of which could [sic] be destroyed if it were not vindicated before trial." By way of contrast, we have generally denied review of pretrial discovery orders. Our rationale has been that in the rare case when appeal after final judgment will not cure an erroneous discovery order, a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling.

Firestone, 449 U.S. at 376-77 (internal citations omitted) (quoting *MacDonald*, 435 U.S. at 860); *see also United States v. Amlani*, 169 F.3d 1189, 1192 n.2 (9th Cir.1999) ("We note, however, that 'courts have refused interlocutory review of . . . [discovery] orders under the collateral order doctrine.'") (alterations in original) (quoting *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1490 (9th Cir.1989)).[11]

In sum, we conclude that the attorney-client privilege and work product immunity claims raised here do not justify invocation of the collateral order doctrine in the pre-

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[11] Appellants cite *In re Grand Jury Proceedings*, 43 F.3d 966 (5th Cir.1994), for the proposition that jurisdiction properly lies, through application of the collateral order doctrine, in an appeal of a discovery order issued in the context of a grand jury proceeding. In that case, as discussed more fully *infra*, this court applied a unique blend of the *Perlman* exception and the collateral order doctrine after determining that the turnover of certain documents would cause the attorney-appellants "irretrievably [to] lose any protectable interest they ha[d] in such documents." *Id.* at 970. That determination was based upon the "unique dilemma presented by [the] case," *id.*, and we decline to expand it into the general proposition Appellants here seek.

indictment context, and we decline, in these appeals, to extend the collateral order doctrine beyond the strict bounds established by the Supreme Court.

B. Individual Appellant

Individual Appellant claims that the documents at issue in Nos. 98-40870 and 99-40271, together with at least some of the documents at issue in No. 99-40262, are his protected work product. Basically, he asserts that regardless of our jurisdiction to entertain the appeals of Corporate Appellants, we have jurisdiction to entertain his appeals because he never handed the documents over to the Government or the court, he does not have the documents in hand, and he, therefore, cannot stand in contempt. He maintains that denying jurisdiction over his appeals would leave him "powerless to avert the mischief of the order[s]." *Perlman*, 247 U.S. at 13. Individual Appellant seems to reason that if, under Fine, a client-intervenor has an automatic route to appeal an order compelling production by her attorney, an attorney-employee should have an automatic route to appeal an order compelling production by his client-employer.

Individual Appellant misses the point of the *Perlman* exception and our case law. In *Fine*, we explained, "The *Perlman* exception was carved out when the general rule was found inapplicable because the subpoenaed party *could not be expected* to risk a contempt citation in order to protect the interests of a powerless third party." 641 F.2d at 202 (emphasis added). We recognized that "a variety of other results and remedies are available in cases outside of the standard attorney-client relationship, and we [declined to] decide issues of appealability in those more unique cases." *Id.* at 203 n.3.

Appellants are all targets of the grand jury investigation. Because of this, Corporate Appellants, like Individual Appellant, have a stake in keeping the documents at issue here from production. Corporate Appellants can hardly be described as having "no independent interest in preserving [the documents'] confidentiality," *Ritchie*, 480 U.S. at 77 n.3, because they simply are not "disinterested third part[ies]," *Church of Scientology*, 506 U.S. at 18 n.11. To find jurisdiction over Individual Appellant's claims would set a standard allowing direct, immediate appeal of a contested discovery order any time any non-subpoenaed party could claim any stake in the resolution of the contested order. Neither *Perlman* nor its interpretation in *Fine* was intended as a backdoor around the *Cobbledick* doctrine.

Individual Appellant has failed to demonstrate to this court that his situation warrants application of the *Perlman* exception. At this stage, Individual Appellant's interests can only be vindicated, if at all, in an appeal by Corporate Appellants over which we have jurisdiction.

C. Corporate Appellants

1. Nos. 98-40870 and 99-40271

In both of these appeals, Corporate Appellants assert that a particular document was inadvertently turned over to the Government. The Government does not contest the inadvertence of the disclosure of the Memorandum in No. 99-40271. However, in No. 98-40870 the Government contends, and the district court found, that the Document was intentionally produced.

Corporate Appellants rely heavily on the opinion of the Court of Appeals for the D.C. Circuit in *In re Grand Jury Investigation of Ocean Transport.*, 604 F.2d 672 (D.C. Cir.

1979), for the proposition that once a document has been inadvertently disclosed, the opportunity to stand in contempt is lost, and immediate appeal is allowed under the *Perlman* exception. In *Ocean Transport.*, certain documents belonging to Sea-Land were subpoenaed. Sea-Land's original counsel was instructed to withhold from production those documents he deemed covered by attorney-client privilege. He marked certain documents with a "P" and turned the remaining documents over to the government. He also turned over certain documents marked with a "P." Six months later, Sea-Land's original counsel realized his error and notified the government that a formal demand for return of the documents marked with a "P" was forthcoming. A formal demand was finally made by Sea-Land's new counsel a year-and-a-half after the original disclosure. The D.C. Circuit determined that "the rationale of *Perlman v. United States*, . . . not of the *Cobbledick* case, applie[d]," *id.* at 673, and that the collateral order doctrine applied to the case as well. It accepted jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 (1994). *See id.*

In relying so heavily on *Ocean Transport.*, Corporate Appellants miss some important differences between that case and their own. First, in *Ocean Transport.*, the attorney produced documents contrary to the express instructions of the subpoenaed client. Second, in that case there was no "delay or obstruction of the grand jury proceedings threatened by the . . . appeal." 604 F.2d at 674.

When counsel has produced documents in direct contradiction to the express wishes of his client, some of the interests underlying the *Perlman* exception may weigh in favor of allowing immediate appeal. However, these interests alone are not strong enough to overcome the principles favoring finality. But when these interests are coupled with

the fact that an immediate appeal will not impede the progress of the grand jury, as was the case in *Ocean Transport*., the scales may tip, and an immediate appeal may be allowed. Appellants correctly point out that the document production at issue in the instant two appeals, particularly the uncontested inadvertent turnover in No. 99-40271, has some flavor of the production at issue in *Ocean Transport*. Here, however, the appeals are impeding the grand jury proceedings. Admittedly, the inadvertence alleged in these appeals does give some weight to finding jurisdiction under the *Perlman* exception, but, at least under the facts presented here, not enough to overcome the principles favoring final judgment. Whether we would reach the same decision as the D.C. Circuit reached in *Ocean Transport*. on the facts presented in that case must await another day.

Holding that the *Perlman* exception establishes jurisdiction over all cases of inadvertent disclosure would place this court in the precarious position presented in No. 98-40870, where the district court has found that a disclosure was intentional, and Corporate Appellants challenge that finding. In determining the threshold question of jurisdiction, this court would be forced to reach the merits of the appeal and decide whether the turnover was intentional or inadvertent. We decline Corporate Appellants' invitation to start down that road.

In *Gillespie v. United States Steel Corp*., 379 U.S. 148 (1964), the Supreme Court remarked that "in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Id.* at 152-53 (quoting *Dickinson v. Petroleum Conversion Corp*., 338 U.S. 507, 511 (1950)). If "[b]earing the discomfiture and cost of a prosecution for

crime even by an innocent person is one of the painful obligations of citizenship," *Cobbledick*, 309 U.S. at 325, then certainly Corporate Appellants, as a cost of their own alleged or undisputed inadvertence, can be expected to await final judgment for a determination of their claims of privilege. This is not a case where a disinterested third party controlled the fate of the documents disclosed, *see Perlman*, 247 U.S. at 10; nor is it a case where the documents were stolen or seized, *see In re Grand Jury Proceedings Involving Berkley and Co.*, 629 F.2d 548, 550 (8th Cir.1980). Finally, it is not a case where allowing immediate appeal will not impede or delay the grand jury. *See Ocean Transport.*, 604 F.2d at 674. Corporate Appellants themselves controlled the fate of the documents at issue, and the criminal justice system should not be made to bear the brunt of their inadequate precautions.

Accordingly, the Government's motions to dismiss Nos. 98-40870 and 99-40271 for lack of jurisdiction are granted.

2. No. 99-40262

In this appeal, the district court ordered Corporate Appellants to hand over certain documents for in camera inspection to determine the extent to which they were subject to production under the crime-fraud exception. *See United States v. Zolin*, 491 U.S. 554 (1989) (setting forth procedure for in camera inspection in cases where the crime-fraud exception may apply). In their briefs, Corporate Appellants suggest that, under the *Perlman* exception, an immediate appeal lies in every case where a judge determines documents must be produced after an in camera inspection. We cannot agree. So holding would lead to the troubling result that a judge's decision to conduct in camera review will create a right of immediate appeal from the subsequent turnover order. The rule thus established would threaten to swallow

the *Cobbledick* doctrine, increase the number of immediate appeals, and undermine the policies favoring finality. "[E]ncouragement of delay is fatal to the vindication of the criminal law." *Cobbledick*, 309 U.S. at 325.

Nor do we agree with the Government's position that an individual who submits documents for in camera review has forfeited any availability of immediate appeal.[12] This rule would send the message that a subpoenaed party can only secure immediate appeal by resisting the district court's order for in camera review. Promoting this sort of noncompliance would show great disrespect for a trial judge who is attempting to reach the correct result through thorough examination. Short-circuiting the district court in this manner would be the antithesis of finality and would truly elevate form over substance.

The positions advanced by the Government and Corporate Appellants highlight the tension that the in camera procedure followed by the district court here creates with the *Cobbledick* doctrine. Corporate Appellants assert that this tension is resolved in their favor by the holding in *In re Grand Jury Proceedings*, 43 F.3d 966 (5th Cir.1994) ("*Grand Jury*"). In that case, two lawyers were subpoenaed to testify before the grand jury and produce documents. Their client was believed to be dead, although the government disputed that assertion, and other related clients had all expressly waived their claims to attorney-client privilege. On work

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[12] The Government basically argues this position by suggesting that Corporate Appellants' avenue of review was foreclosed by their failure to disobey the order to submit the documents for in camera review and stand in contempt. There is certainly a "judicial interest in allowing a trial court to inspect documents in camera . . . ." *United States v. Billmyer*, 57 F.3d 31, 34 (1st Cir.1995).

product grounds, the attorneys moved to quash the subpoena as it related to certain documents and submitted the disputed documents to the district court for in camera inspection. In a hearing on the motion, the district court ruled that the documents were not work product and ordered them produced in redacted form. "The district court then ordered [the attorneys] to redact the documents in accordance with its order and [re]submit all redacted documents to the district court for turnover to the government . . . ." *Id.* at 968. The attorneys complied. Once the district court had regained possession of the documents, the judge stated, "'I am going to turn them [the remaining documents] over to the government unless the Circuit tells me not to.'" *Id.* (alteration in original). The district judge further stated, "Well, I think generally the issue is appealable now. . . . I want you to preserve your right to appeal. I want you to be able to take up these things . . . ." *Id.* at 969 (alterations in original).

District courts are not in the document delivery business; instead, they are in the business of ruling on document discovery motions. The district court in *Grand Jury* should not have retaken possession of the redacted documents but should have required the attorneys to produce them directly to the government, thereby providing the attorneys an opportunity to refuse production and stand in contempt. The district court's procedural misstep created a "unique dilemma," *id.* at 970, for this court.

When faced with a district court's procedural misstep, an appellate court normally has at least two options. It can accept the flawed procedure and take steps to work around it, or the appellate court can reject the flawed procedure and take steps to correct it. Under the unique facts of *Grand Jury*, judicial efficiency and economy favored application of the former option. Accordingly, in an approach to determining

jurisdiction that was "practical rather than . . . technical," *Cohen*, 337 U.S. at 546, we applied a similarly unique blend of the collateral order doctrine and the principles underlying the *Perlman* exception.[13] We chose to accept the flawed procedure and work around it, and ultimately found jurisdiction, in no small part, because the work product immunity issues addressed on appeal were "completely separate from the merits of the underlying grand jury investigation." *Grand Jury*, 43 F.3d at 970.

In the present appeal, we are faced with a procedural misstep similar to that in *Grand Jury*. In its February 22 order, the district court stated, "In ten days of issuance of this Order, the Court will make said documents available to the Government and will return the remaining in camera documents to [Corporate Appellants]." In this case, as in *Grand Jury*, the responsibility to produce documents lies with the parties and not with the court. When a district court conducts in camera review of documents, determines that production is appropriate and so orders, it should, as a matter of course, provide the individual who submitted the documents for in camera review an opportunity to comply with the court's order or stand in contempt.[14] Once the

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[13] As a general matter, the *Perlman* exception either applies or does not apply to a particular factual scenario on its own terms. The same is true of the *Cohen* collateral order doctrine. *See In re Grand Jury Subpoenas*, 123 F.3d 695, 699 (1st Cir.1997) (declining to apply both *Perlman* and the collateral order doctrine to determine the appealability of a denial of a motion to quash a subpoena). Under normal circumstances, the two doctrines should not be used in conjunction with one another. In *Grand Jury*, however, we were not faced with normal circumstances.

[14] Physically returning the documents to the owner or custodian is not paramount here. What matters is that the district court allow the individual some opportunity, on the record, to accept compliance with the court's order or stand in contempt.

district court has provided the individual with this opportunity, the individual must, in order to secure an immediate appeal, stand in contempt as *Cobbledick* requires. This procedure secures for the individual an avenue of immediate review of the district court's order, maintains the integrity of the *Cobbledick* doctrine in the context of in camera inspection of documents, and supports the principles underlying the finality requirement.

Here, the district court failed to follow this procedure. Appellants now urge us to, as we did in *Grand Jury*, accept the district court's procedural misstep and work around it by applying the *Perlman* exception and collateral order doctrine to determine jurisdiction.[15] However, employing that approach in this case would plunge us into the very difficult issue of deciding whether, in determining if the acts Corporate Appellants are alleged to have committed even constitute a crime for purposes of applying the crime-fraud exception, we have reached the merits of a secret, ongoing grand jury investigation. We decline Appellants' invitation and, instead, choose the second option of rejecting the flawed

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[15] Quoting *Grand Jury*, Corporate Appellants assert that "where a court has possession of documents and thereafter issues an immediately enforceable order to turn over the documents to the other party, the order is sufficiently ripe for appellate review." 43 F.3d at 969 (citing *Perlman*, 247 U.S. at 13). This statement holds true in a peculiar case, such as *Perlman* itself, dealing with a "third party intervenor whose documents were in [the] custody of [the] trial court at [the] time [the] order issued," *id.*, or *Grand Jury*, where incorrect procedures had been followed, the death of a client holding a potential interest in the documents was at issue, and the issues on appeal were unquestionably separate from the merits of the underlying investigation. But the statement may not hold true here, and we need not decide whether it does because we are not, as Corporate Appellants suggest, limited to the approach taken in *Grand Jury*.

procedure and taking steps to correct it by granting mandamus.[16]

It is, therefore, ORDERED that the district court return to Corporate Appellants the documents as to which, in its February 18, 1999, order, it found the Government entitled to discovery. If Corporate Appellants wish to appeal that discovery order, they must stand in contempt as contemplated by *Cobbledick.*

The Government's motion to dismiss No. 99-40262 for lack of jurisdiction is granted.

IV. CONCLUSION

For the foregoing reasons, we DISMISS Nos. 98-40870, 99-40262, and 99-40271 for want of subject-matter jurisdiction and GRANT mandamus in No. 99-40262 ordering the district court to return certain documents as more fully set forth herein.

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[16] This court has the discretion to treat an appeal as a petition for a writ of mandamus under the All Writs Statute, 28 U.S.C. § 1651 (1994). *See Southern Pac. Transp. Co. v. San Antonio*, 748 F.2d 266, 270 (5th Cir.1984) (citing *United States v. Briggs*, 514 F.2d 794, 808 (5th Cir.1975)). However, the writ is generally considered a "'drastic remedy.'" *In re Burlington Northern, Inc.*, 822 F.2d 518, 522 (5th Cir.1987) (quoting *In re EEOC*, 709 F.2d 392, 394 (5th Cir.1983)). "To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek, and carry 'the burden of showing that [their] right to issuance of the writ is "clear and indisputable." ' " *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989) (alteration in original) (citations omitted) (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953)). It is well-established that the writ is appropriate in certain cases "compelling discovery against a claim of privilege." *Burlington*, 822 F.2d at 522 ("[C]ases have recognized the importance of the asserted privilege and the absence of an adequate alternative method of obtaining review.").